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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1951

No. 329

M. P. MULLANEY, Commissioner of Taxa-
tion of the Territory of Alaska,

Petitioner,

VS.

OSCAR ANDERSON and ALASKA
FISHERMEN'S UNION,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 162) is reported at 191 F. 2d 123; that of the district court (R. 14), at 91 F. Supp. 907.

JURISDICTION.

The judgment of the Court of Appeals was entered June 25, 1951 (R. 196). The petition for a writ of certiorari was filed September 17, 1951, and was granted November 5, 1951. The jurisdiction of this Court rests on Section 1251 of the new Federal Judicial Code.

QUESTION PRESENTED.

Whether an Act of the Legislature of the Territory of Alaska imposing on nonresident fishermen a license tax of \$50, and on resident fishermen, \$5, is a valid exercise of the taxing power of the Territory.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, infra, pp. i-viii.

STATEMENT.

Chapter 66, Session Laws of Alaska 1949 (enacted March 21, 1949), requires all commercial fishermen who take fish from the fishery resources of Alaska to obtain an annual license from the territorial Tax Commissioner. For such license the fee charged a nonresident fisherman is \$50; that charged a resident is \$5. On May 26, 1949 this action, seeking a declara-

tion from the court that Chapter 66 is unconstitutional and invalid insofar as it imposes a higher license fee on nonresidents than on residents and praying for an injunction to restrain the Tax Commissioner from making collection of the nonresident tax, was brought by Oscar Anderson, Secretary-Treasurer of the respondent Union, and the Alaska Fishermen's Union on behalf of some 3200 of its members who are nonresidents and who fish in Alaska each year (R. 2-6).

At the trial in the district court, on March 16, 1950 (R. 46) petitioner introduced testimony which showed, among other things, that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen, that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents than with respect to the resident fishermen (R. 95-120). No attempt was made by respondents to contradict the testimony from which such findings were made. The district court consequently held that there were sufficient differences between resident and nonresident fishermen to justify the classification in the amount of license fees between the two, sustained the

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validity of Chapter 66, and ordered that the complaint be dismissed (R. 14-44).

On appeal the court below (with Chief Judge Denman dissenting) reversed the district court, holding (1) that the movement of nonresident fishermen each year into Alaska constitutes interstate commerce (R. 169); (2) that the necessary effect of the imposition of a higher tax on the nonresidents was to discourage, hamper, and burden such commerce (R. 171); (3) that no facts appeared in the record to sustain the discrimination, and moreover, that the existence of the discrimination by itself demonstrated its invalidity and overcame any presumption of validity which might otherwise attach to Chapter 66 (R. 182); (4) that the Territory had no power over taxation different from that possessed by a state, and hence had no greater freedom in burdening commerce between the states and the Territory than it would if Alaska were a state (R. 169, 171-172, 185); and (5) that (for the foregoing reasons) so much of the tax under Chapter 66 as exceeds that charged resident fishermen is void (R. 185). By way of dictum, the court also stated that if it were not for *Haavik v. Alaska Packers' Association*, 263 U.S. 510, it would be obliged to find that the facts in the record would not be sufficient (under its interpretation of *Toomer v. Witsell*, 334 U.S. 385) to justify the differential in the tax, and that the discrimination would be, therefore, also in violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution (R. 185-

186). In argument in the court below, respondents also relied upon the application of Section 41 of the Civil Rights Act (8 USCA §41) to the legislation in question, but the court failed to construe this statute (R. 194).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding that Chapter 66, in imposing on non-resident fishermen a higher license fee than that exacted from resident fishermen, constitutes an unconstitutional burden on and discriminates against interstate commerce.
2. In holding that the Territory of Alaska has no more power over taxation than if it were a state, and hence, that the Territory, in enacting tax laws, is limited to the same extent as a state by the commerce clause of Article I, §8, of the federal Constitution.
3. In failing to recognize—in view of the record in this case—the presumption that Chapter 66 is constitutional, and in failing to require respondents to maintain their burden of proof that the \$50 tax is unreasonable, arbitrary or excessive.
4. In holding that if it were not for *Huavik v. Alaska Packers' Association*, 263 U.S. 510, the differential in tax between nonresidents and residents would constitute a violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution.

5. In failing to construe Section 41 of the Civil Rights Act (8 USCA §41).

SUMMARY OF ARGUMENT.

I.

The validity of Chapter 66, which imposes on non-resident fishermen a license tax greater in amount than that exacted from residents, cannot be determined by application of those clauses of the Constitution relating to interstate commerce, privileges and immunities of state citizenship; or equal protection of the laws, since none of them are a limitation on the legislative power of the Territory of Alaska. The reason for this conclusion is this: Obviously, certain constitutional provisions were intended to apply only to states and not to territories of the United States. Examples of these are (1) those parts of Article I and of the Fourteenth and Seventeenth Amendments relating to the United States Senate and House of Representatives; (2) that portion of §9 of Article I which prohibits Congress from giving any preference by regulation of commerce or revenue to the ports of one state over those of another, *Alaska v. Troy*, 258 U.S. 101, 111; (3) that part of Article III, §2, which limits jurisdiction of the courts of the United States to controversies between citizens of different states, *Hepburn v. Elzey*, 2 Cranch 445, 452, *New Orleans v. Winter*, 1 Wheat. 91, 94, *National Mutual Insurance Co. v. Tidewater*.

Transfer Co., 337 U.S. 582; and (4) the Tenth Amendment. Hence, the broad language of §3 of the Alaska Organic Act, which gives the Constitution of the United States "the same force and effect within the said Territory as elsewhere in the United States" (37 Stat. 512, 48 USCA §23), cannot be interpreted as referring to all provisions of the Constitution, but must be limited to only those parts which are applicable to the Territory. See concurring opinion of Mr. Justice White in *Downes v. Bidwell*, 182 U.S. 244, 291-292; *Alaska v. Troy*, 258 U.S. 101, 110. Therefore, if for good reasons it appears that the commerce clause, the privileges and immunities clause of Article IV, and the equal protection clause of the Fourteenth Amendment were intended to be a limitation solely upon the legislative power of the states, as distinguished from the territories, it will be perfectly logical to hold that those provisions were not extended to the Territory of Alaska by §3 of the Organic Act.

1. Although it is necessary for the courts to interpret the commerce clause in its application to the competing demands of State and National interests, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769-770, it is not necessary where the Territory is involved, since unlike a state it possesses no sovereignty and is completely subject to the will of Congress—even to the extent of congressional abrogation of any act of the Territorial legislature. 37 Stat. 518, 48 USCA §90; see *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314. Furthermore, Congress, in legis-

lating for the Territory, has full and complete power—which does not depend for its existence upon the commerce clause of the Constitution, *El Paso & North-eastern Railway Co. v. Gutierrez*, 215 U.S. 87, 95,—and in exercising this power it may constitutionally burden or discriminate against interstate commerce in order to accomplish a legitimate end. *Morgan v. Virginia*, 328 U.S. 373, 380. Hence, the courts should be reluctant to interfere when the power exercised is that of the legislature of the Territory and constitutes a means of accomplishing an end that would be desired by Congress. Cf. *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 313-314, for otherwise there would be danger of an unlawful interference by the judiciary with the power exclusively vested in Congress by Article IV, §3, of the Constitution to legislate for the Territory. There is, therefore, no compelling reason why the commerce clause should have the consequential effect of limiting territorial action. *Buscaglia v. Ballester*, 162 F. 2d 805, 806-807, certiorari denied 332 U.S. 816.

2. The privileges and immunities clause of Article IV, §2, has no application here since that clause “... must be read in conjunction with the Tenth Amendment to the Constitution”, (concurring opinion of Mr. Justice Frankfurter in *Toomer v. Witsell*, 334 U.S. 385, 407), and has for its primary purpose the fusing into one Nation of “... a collection of independent, sovereign States”, *Toomer v. Witsell*, supra, p. 395. Alaska being a territory and not a state, the Tenth

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Amendment has no application, and moreover Alaska is anything but "independent" or "sovereign" since all its actions depend completely upon the will of Congress. See *Anderson v. Scholes*, 12 Alaska 295, 83 F. Supp. 681, 687. Hence, this Court was correct in holding in *Huavik v. Alaska Packers' Association*, 263 U.S. 510, 515, that the privileges and immunities clause is a limitation only upon the States and not upon the Territory of Alaska. Cf. *Duchay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 762, 775.

3. Neither is the equal protection clause of the Fourteenth Amendment a standard against which Territorial legislation is to be tested. This amendment consists mainly of prohibitions aimed exclusively at the States and not at Congress, and since all power over territories is vested in Congress, there was no practical reason for extending these limitations to territories of the United States. See Langdell, *The Status of Our New Territories*, 12 Harvard Law Review 365, 376, (1899). Thus, the classification in Chapter 66 is to be tested against the Fifth Amendment to the Constitution, (see *Farrington v. Tokushige*, 273 U.S. 284, 299), which contains no equal protection clause but restrains only such discriminatory legislation as amounts to a denial of due process. *Hirabayashi v. United States*, 320 U.S. 81, 100.

II.

Even if it had been the intention of Congress in enacting § 3 of the Alaska Organic Act (37 Stat. 512,

48 USCA § 23) to give Alaska no greater taxing power than that possessed by the states, subsequent congressional acquiescence in a taxing scheme such as that contained in Chapter 66 has constituted a waiver or removal of the limitations of the commerce clause, the privileges and immunities clause of Article IV, and the equal protection clause of the Fourteenth Amendment as far as license taxes on fishermen in Alaska are concerned. This is apparent from the following:

(1) The primary objective of Congress in making "all needful rules and regulations" for the Territory (Article IV, § 3, United States Constitution) is to develop the Territory's natural resources and increase its permanent population. This objective is evidenced by the recently enacted Alaska Public Works Act (Act of Aug. 24, 1949, 63 Stat. 627, et seq., 48 USCA § 486), which has for one of its primary purposes "... the settlement and increase (of) the permanent residents of Alaska ..." (48 USCA § 486).

(2) Alaska's greatest natural resource is its fisheries (R. 168). Therefore any action by the Territorial legislature which would reasonably tend to develop this resource and increase the permanent population of the Territory would logically meet with congressional approval.

(3) The business of fishing in Alaska has always been a main subject for consideration by Congress. See *Alaska Pacific Fisheries v. Territory of Alaska*,

236 F. 52, 57-58, and laws pertaining to Alaska fisheries in 48 USCA §§ 221-247.

(4) Alaska has had for nearly thirty years a license tax on nonresident fishermen greater in amount than that imposed on residents, and at no time during this period has Congress shown any sign of dissatisfaction with this exercise of legislative power. Cf. *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277-278, or with the interpretation given it by the courts. See *Haavik v. Alaska Packers' Association*, 263 U.S. 510; *Anderson v. Smith*, 71 F. 2d 493.

(5) As far as the business of fishing was concerned, Congress was not content with the general extension of Territorial legislative power "to all rightful subjects of legislation" (Alaska Organic Act, §9, 37 Stat. 514, 48 USCA §77), which would have constituted a sufficient basis for Territorial taxation. Cf. *Peacock & Co. v. Pratt*, 121 F. 772, 775-776, but made specific reference to the Territorial power of taxation with respect to the fisheries of Alaska (White Act, §8, 43 Stat. 467, 48 USCA §228).

(6) A scheme of tax incentive such as that contained in the classification in Chapter 66 has a natural tendency to encourage those who earn their livelihood from the fisheries to acquire a local residence and to promote rather than retard the permanent growth of population in the Territory and achieve ultimate congressional objectives.

Hence, Congress having waived the limitations of those clauses of the Constitution pertaining to commerce, privileges and immunities, and equal protection of the laws, as far as is concerned a taxing scheme such as that contained in Chapter 66, the Alaska legislature, in classifying resident and nonresident fishermen, is restrained only by the due process clause of the Fifth Amendment, or by the standard established by Congress that citizens shall not be denied the right to fish in the waters of Alaska (White Act, §1, 43 Stat. 464, 48 USCA §222)—either of which would appear to restrain only such discriminatory legislation as would amount to a practical prohibition of the right of a nonresident fisherman to fish in the waters of Alaska. See *Anderson v. Smith*, 71 F. 2d 493, 495. Respondents have not even suggested that the \$50 tax has such an effect. There was good reason then to hold, as this Court has done, that the power of taxation of the Territory, at least with respect to fisheries, is "express and unlimited," *Alaska Fish Co. v. Smith*, 255 U.S. 44, 49, and an "unlimited power expressly given", *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277. Chapter 66 is, therefore, valid against the assertions that the limitations in those clauses of the Constitution relating to commerce, privileges and immunities of state citizenship, and equal protection of the laws have been contravened.

III.

Even if Alaska were a state and the Constitution did not thus have a limited application, Chapter 66

would still be perfectly constitutional and valid. The record clearly shows that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen, that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents than with respect to the resident fishermen (R. 95-120).

1. Hence, as far as equal protection is concerned, it can hardly be said that the classification between resident and nonresident fishermen in Chapter 66 does not rest on substantial differences bearing a rational relation to the object of the legislation, which is principally to raise revenue. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415. A presumption of constitutionality was raised which cast upon respondents the burden of demonstrating very clearly that either the purpose or effect of the statute was a hostile or oppressive discrimination against the nonresident fishermen. *Madden v. Kentucky*, 309 U.S. 83, 88; *Metropolitan Insurance Co. v. Brownell*, 294 U.S. 580, 584. This burden they have failed to maintain, apparently on the theory that in order to sustain Chap-

ter 66, the Territory must prove that the differential in tax is equal to the difference in costs of collection between the nonresident and resident taxes. Such a position, of course, is untenable for if the legislature, in enacting tax laws, is forced to consider with mathematical exactitude the difference between classes, then it can hardly function as a legislature. Such an interpretation of equality of taxation would constitute, in effect, a serious blow at the Territorial government's most vital function—its power to raise revenue for its continued existence, and would constitute an intolerable supervision completely beyond the protection which the equal protection clause of the Fourteenth Amendment was intended to assure. Cf. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. Thus, because of the showing made by petitioner, and because respondents have made no attempt to maintain their burden of establishing unconstitutionality, it must be held that the classification in Chapter 66 does not violate the equal protection clause of the Fourteenth Amendment.

2. When an act is alleged to violate the commerce clause, the presumption of validity also attaches and the burden rests upon one assailing the statute to prove its invalidity in this respect. Particularly is this true when a tax like the one here is directly laid upon a local business subject to local taxation, and only incidentally affects interstate commerce. See *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*,

301 U.S. 183, 187-188. It may well be true that the freedom of persons to travel from the States to Alaska is a proper subject of the commerce clause, (see *Edwards v. California*, 314 U.S. 160, 172); but to extend this protection to give a citizen of a state refuge from taxation which has not been shown to impose any restraint or undue burden upon him, is to take such immunity from taxation and extend it far beyond the interests put forward to justify it and to a point not necessary for the protection and uniformity of national commerce. Therefore, since respondents have failed to maintain their burden of showing any actual restraint resulting from the imposition of a \$50 fishing license tax, Chapter 66 cannot be declared invalid on the ground that it constitutes an unconstitutional burden upon or discrimination against interstate commerce. See *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251.

3. Implicit in that portion of the lower court's opinion dealing with the privileges and immunities clause of Article IV, § 2 (R. 185-186), is the thought that petitioner had not made a sufficient showing and that it was his further obligation, in order to sustain the higher tax on nonresidents, to prove that the tax differential in Chapter 66 was equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting the taxes from residents. But to interpret this clause as precluding all differences in taxation, rather than those which have been proved by the one attacking the statutory classifica-

tion to be arbitrary and unreasonable, is, we submit, clearly erroneous; for such an interpretation takes the iron rule of equal taxation, which the equal protection clause has failed to impose, *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, 237, and makes it the standard against which taxing classifications must be tested where state citizenship is involved. This would constitute a very severe restriction on the taxing power of the Territory, wholly beyond the protection that the privileges and immunities clause was intended to assure. Hence, we submit that if the classification in Chapter 66 does not violate the requirements of equal protection, it cannot be condemned by invoking the privileges and immunities clause of Article IV, § 2, of the Constitution.

IV.

1. The Civil Rights Act (R.S. § 1977, 8 USCA § 41) is by its express terms applicable to territories as well as states. But since its purpose was to prevent the denial to one of equality of rights under law because of alienage or color, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419-420, its application to the Territory does not have the effect of adding to that required minimum of equality of law secured by the due process clause of the Fifth Amendment (see *Truax v. Corrigan*, 257 U.S. 312, 332), which, because of the inapplicability of the equal protection clause of the Fourteenth Amendment to territories, is the standard that limits territorial legislatures where tax classifications are involved. On the other hand, even if the Civil Rights Act did demand

equality of taxation between resident and nonresident fishermen, it could not be given a broader scope than the Fourteenth Amendment, since it and the Amendment "... were closely related both in inception and in the objectives which Congress sought to achieve", *Hurd v. Hodge*, 334 U.S. 24, 32. Therefore, if Chapter 66 does not violate the equal protection clause of the Fourteenth Amendment, the requirements of the Civil Rights Act are satisfied.

2. § 9 of the Alaska Organic Act requires that "all taxes shall be uniform upon the same class of subjects ..." (37 Stat. 514, as amended, 48 USCA § 78). But even if this provision has application to other than ad valorem property taxes, it would still require no greater measure of uniformity or equality of taxation than that demanded by equal protection of the laws. *Alaska Steamship Co. v. Mullaney*, 180 F. 2d 805, 817-818. Therefore, if the classification in Chapter 66 does not violate the Fourteenth Amendment, it does not contravene § 9 of the Alaska Organic Act.

ARGUMENT.

I.

CHAPTER 66 IS VALID SINCE THE CONSTITUTION OF THE UNITED STATES DOES NOT APPLY WITH THE SAME FORCE TO THE TERRITORY OF ALASKA AS IT DOES TO THE SEVERAL STATES.

The court below has held that the imposition of a tax on nonresident fishermen greater in amount than that exacted from residents constitutes an unconsti-

tutional burden against interstate commerce (R. 171), and is invalid for that reason (R. 185). It further stated that the same result would have been reached under the privileges and immunities clause of Article IV, § 2, of the Constitution were it not for the holding in *Haavik v. Alaska Packers' Association*, 263 U.S. 510, that this clause is inapplicable to the Territory (R. 186). Although the court below did not discuss it, respondents also had urged, both in the district court (R. 4) and in the Court of Appeals (R. 166), that this classification between resident and nonresident fishermen was a violation of the equal protection clause of the Fourteenth Amendment to the Constitution.

Obviously if it can be shown that neither the commerce clause, the privileges and immunities clause of Article IV, or the equal protection clause of the Fourteenth Amendment are a limitation on the legislature of the Territory, as they would be if Alaska were a state, then it would necessarily follow that the holding of the court below was erroneous and that respondents' claims of invalidity of Chapter 66 would have no merit. To a large extent the solution of this problem depends upon the meaning to be given to certain portions of §§ 3 and 9 of the Alaska Organic Act. The former provides in part that—

"The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." (37 Stat. 512, 48 USCA § 23).

The latter, i.e., § 9, contains this provision:

"The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . ." (37 Stat. 514, 48 USCA § 77).

There are certain provisions of the Constitution that can possibly have no application to a territory and thus cannot have the "same force and effect" therein as they do in the States. Such are: (1) Those parts of Article I and of the Fourteenth and Seventeenth Amendments relating to the United States Senate and House of Representatives—it never having been claimed that Alaska, in the absence of statehood, could have any representation in the Senate and other than a voteless delegate in the House of Representatives; (2) that portion of § 9 of Article I which prohibits Congress from giving any preference by any regulation of commerce or revenue to the ports of one state over those of another, which this Court has held in *Alaska v. Troy*, 258 U.S. 101, 111, does not include an organized and incorporated territory such as Alaska; (3) the provisions of Article II and of the Twelfth Amendment pertaining to the election of the President and Vice-President of the United States, since Alaska, not being entitled to Senators and Representatives in Congress, cannot through its legislature appoint electors; (4) that portion of Article III, § 2, which limits jurisdiction of the courts of the United States to controversies between citizens

of different states, since this Court has held that within the meaning of that clause neither a citizen of the District of Columbia, *Hepburn v. Ellzey*, 2 Cranch 445, 452, or of a territory, *New Orleans v. Winter*, 1 Wheat. 91, 94, has the standing of a citizen of one of the States of the Union; (see, also, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582); (5) Article V, which pertains to amendments to the Constitution by application of the legislatures of "two-thirds of the several states"; and (6) the Tenth Amendment, since the people of Alaska have no reserved powers at all but only those expressly delegated to them by Congress. No one can seriously argue that the words "state" or "states" as used in the foregoing provisions of the Constitution have at any time been intended to include territories. Hence, § 3 of the Organic Act, in extending the Constitution to the Territory and giving it the same force and effect therein as elsewhere in the United States, must have been intended to include only those provisions of the Constitution which are applicable to the Territory. See concurring opinion of Mr. Justice White in *Downes v. Bidwell*, 182 U.S. 244, 291-292; *Alaska v. Troy*, 258 U.S. 101, 110. This being true, then it is perfectly logical to hold that those clauses of the Constitution pertaining to interstate commerce, privileges and immunities of state citizenship, and equal protection of the laws, will not limit Territorial action if for good reasons it appears that they were not meant to be applicable to the Territory when the Constitution was extended to Alaska.

1. The commerce clause does not limit Territorial action.

This Court has held that the commerce clause of the Constitution not only confers upon Congress the power to prescribe legislation for the protection and encouragement of commerce among the states, but also has the consequential effect of limiting state legislation in certain instances where Congress has not acted. *Freeman v. Hewit*, 329 U.S. 249, 252. The reason for this conclusion is based upon the principle that there are certain phases of national commerce "... where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose." *Morgan v. Virginia*, 328 U.S. 373, 377, and which "... demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767. It has been also held that Congress has left it to the courts to be the final arbiter of the competing demands of state and national interests and to interpret the commerce clause in its application thereto, because of the possible destructive consequences to commerce if the protection of the courts were withdrawn. *Southern Pacific Co. v. Arizona*, *supra*, pp. 769-770.

It is not necessary, however, to leave this matter to the courts where the Territory is involved, since unlike a state the former possesses no sovereignty and is completely subject to the will of Congress, even to the extent of congressional abrogation of any act of the Territorial legislature. (37 Stat. 518, 48 USCA § 90). See *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314. Furthermore, there are

possible instances where Congress, in order to accomplish some legitimate purpose in the Territory under the authority of the second clause of Article IV, § 3, of the Constitution, might desire to enact legislation which incidentally would have the effect of burdening or discriminating against commerce, and such action the courts could not invalidate under the commerce clause as they could if it were that of a state. *Morgan v. Virginia*, 328 U.S. 373, 380. This Court then should be reluctant to interfere when the action is that of the Territorial legislature and constitutes an effective means of accomplishing an end that would be desired by Congress, for otherwise there would be the grave danger of an unlawful interference by the judiciary with the power exclusively vested in Congress to legislate for the Territory—a power which does not depend for its existence or its validity upon the commerce clause of the Constitution. See *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314; *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87, 95; *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 500. Therefore, since Congress has full and complete legislative authority over the Territory of Alaska, there is no reason why the commerce clause should have the consequential effect of limiting any action by the Territorial legislature. *Buscaglia v. Ballester*, 162 F. 2d 805, 806-807, certiorari denied, 332 U.S. 816.

2. The privileges and immunities clause of Article IV, §2, does not limit Territorial action.

There is good reason for concluding, as was done in *Haavik v. Alaska Packers' Association*, 263 U.S. 510, 515, that the privileges and immunities clause of Article IV is not applicable to the Territory and thus does not have the same force and effect therein as it does elsewhere in the United States. This clause "must be read in conjunction with the Tenth Amendment to the Constitution," (concurring opinion of Mr. Justice Frankfurter in *Toomer v. Witsell*, 334 U.S. 385, 407); and, as was stated by Mr. Chief Justice Vinson in the majority opinion of that case (p. 395):

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of *independent, sovereign States*." (Emphasis added.)

But Alaska is a territory and not a state, and because of the distinction between the two, can make no claim to being sovereign. Moreover, it is anything but "independent" since all its actions depend completely upon the will of Congress. Hence, the Tenth Amendment having no application to the Territory, and the Territory not being part of the "collection of independent, sovereign States"; it is clear that the privileges and immunities clause was intended to be applicable only to states and not to territories. Furthermore, in *Paul v. Virginia*, 8 Wall. 168, Mr.

Justice Field, in speaking of this clause stated (p. 180):

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." (Emphasis added.)

But since "Alaska does not yet enjoy the political status which would bring its residents within the constitutional meaning and definition of 'citizens' as applied to citizens of the United States who are domiciled in the States and therefore citizens of the States," *Anderson v. Scholes*, 12 Alaska 295, 83 F. Supp. 681, 687, the right to fish in the waters of Alaska, although one recognized by Congress in the White Act (43 Stat. 464, 48 USCA § 222), is not an advantage resulting from citizenship in a State within the meaning of the privileges and immunities clause, and is, therefore, not a right or advantage for the denial of which one can invoke the protection of this clause of the Constitution. Hence, this clause is a limitation upon the states only and does not restrict the action of the legislature of the Territory of Alaska. Cf. *Duchay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 768, 775.

3. The equal protection clause does not limit Territorial action.

As pointed out above, the word "states" as used in various parts of the Constitution has a definite meaning, i.e., "... the political organizations that form

the Union and alone have power to amend the Constitution," Mr. Justice Frankfurter dissenting in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 653. This being the case, no logical reason suggests itself why, in the adoption of the Fourteenth Amendment, any more than in the original Articles, the word "state" was meant to include a territory of the United States. See *Langdell, The Status of our New Territories*, 12 Harvard Law Review 365, 376 (1899). Moreover, if the equal protection clause were applicable, it would be only consistent to hold that another portion of the same sentence in which it is contained—that relating to due process—would also be applicable. But this Court has held that the due process clause of the Fifth Amendment is the one that restrains territorial action. *Farrington v. Tokushige*, 273 U.S. 284, 299, and not that of the Fourteenth Amendment. Hence, if one phrase of one sentence in §1 of the Fourteenth Amendment—that relating to due process—has no application to the Territory, it would be only logical to conclude that another phrase of the same sentence—that dealing with equal protection—should also be inapplicable. The only reasonable conclusion then is that the Fourteenth Amendment relates solely to the states and not to the territories, and that the latter are limited only by the Fifth Amendment which contains no equal protection clause but restrains only such discriminatory legislation by the Territory as amounts to a denial of due process. Cf. *Hirabayashi*

v. United States, 320 U.S. 81, 100; *Detroit Bank v. United States*, 317 U.S. 329, 337-338.

These conclusions then are inescapable: (1) When Congress formally extended the Constitution to the Territory of Alaska, it did so only so far as various provisions therein were applicable to territories, as distinguished from states; (2) neither logic nor reason will support the view that either the commerce clause, the privileges and immunities clause of Article IV, or the equal protection clause of the Fourteenth Amendment was intended to be a limitation upon the legislative power of the territories; and (3) that § 3 of the Organic Act (48 USCA § 23) in giving the Constitution the same force and effect within the Territory as elsewhere in the United States, did not, therefore, make those clauses of the Constitution a limitation upon the legislative power of the Territory of Alaska. Hence, Chapter 66, in exacting from nonresident fishermen a license tax greater in amount than that demanded of the residents, does not contravene these constitutional limitations.

And this conclusion is adhered to notwithstanding the general language in *Duncan v. Kahanamoku*, 327 U.S. 304, 317, to the effect that "... Congress did not intend the Constitution to have a limited application to Hawaii." This expression of opinion must be taken in connection with and limited to the case there decided, i.e., "... civilians in Hawaii are entitled to the constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country" (p. 318), and should not serve as au-

thority for the general principle that all provisions of the Constitution are as fully applicable in the territories as they are in the states, See *Downes v. Bidwell*, 182 U.S. 244, 258-259.

II.

EVEN IF THE CONSTITUTION ORIGINALLY DID NOT HAVE A LIMITED APPLICATION TO ALASKA, SUBSEQUENT CONGRESSIONAL ACQUIESCENCE IN A TAXING SCHEME SUCH AS THAT CONTAINED IN CHAPTER 66 HAS CONSTITUTED A WAIVER OF CERTAIN CONSTITUTIONAL LIMITATIONS.

In *Downes v. Bidwell*, 182 U.S. 244, p. 271, Mr. Justice Brown stated that the following propositions could be considered as established:

"6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith."

If this general statement is applicable to those clauses of the Constitution which are being considered here, then an additional argument is immediately furnished for the conclusion reached in Part I of this brief that all parts of the Constitution were not meant to have the same force and effect in the Territory as elsewhere in the United States. That argument is as follows: As has already been pointed out, congressional legislation cannot be declared invalid by the courts on the grounds that it burdens interstate commerce, *Morgan v. Virginia*, 328 U.S. 373, 380; that it violates the privileges and immunities clause of Article

IV, § 2, *Duehay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 768, 775; or that it offends the equal protection clause of the Fourteenth Amendment, *Truax v. Corrigan*, 257 U.S. 312, 332, 340; *Steward Machine Co. v. Davis*, 89 F. 2d 207, 211, affirmed in 301 U.S. 548; *Neild v. District of Columbia*, 110 F. 2d 246, 256-257. Therefore, it is only logical to assume that Congress did not intend these restrictions on state action to limit the legislature of the Territory, for had they been once formally extended to the Territory, they would, under the rule in *Downes v. Bidwell*, supra, necessarily have the effect of constituting a limitation on congressional action. It is not to be presumed that Congress would thus have intended to so limit its sovereign power over the Territory which it possesses by Article IV, § 3, of the Constitution—a power that is full and complete. *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314; *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323.

On the other hand, if the rule announced in the *Downes* case, supra, should be limited to those fundamental limitations in favor of personal rights which are inherent in natural law and formulated in the Constitution, *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44; *Downes v. Bidwell*, supra, pp. 282-283, and if not included in these are the privileges and immunities of state citizenship under Article IV, § 2, and the equality demanded by the Fourteenth Amendment (as distinguished from the required minimum of equality guaranteed by due process—see *Truax v. Corrigan*, 257

U.S. 312, 332), then even if these provisions had been extended to the Territory under § 3 of the Organic Act (48 USCA § 23), they could later be restricted or limited in their application to Territorial legislation if Congress so desired because of the full and complete power that Congress has with respect to territories and because such action would not involve a denial of any fundamental right or immunity which goes to make up our freedoms. Cf. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 585. In addition, the limitations of the commerce clause on the Territorial legislature could, too, be suspended in the same manner by Congress in its discretion, since if Congress can burden commerce to achieve a permitted end, *Morgan v. Virginia*, 328 U.S. 373, 380, it can, under Article IV, allow the Territorial legislature to burden commerce in order to accomplish a like end. Consequently, even assuming for the sake of argument that § 3 of the Organic Act (48 USCA § 23) gave these clauses of the Constitution the same force and effect within the Territory as elsewhere in the United States, Congress could, subsequent to the enactment of the Organic Act, by express or tacit consent, limit the restriction of these clauses in relation to certain actions of the Territorial legislature if Congress considered that desirable as a means of accomplishing a legitimate purpose. It is not difficult to find such consent as far as Chapter 66 is concerned.

First of all, it is reasonable to assume that since the political destiny of Alaska, like any incorporated territory, is ultimate statehood, the development of

natural resources, together with the settlement and increase of permanent population in the Territory, would be the primary objective of Congress in making "all needful rules and regulations" for the Territory under the authority of Article IV, § 3, of the Constitution. That this is the purpose of Congress is clearly shown, for example, by the recently enacted Alaska Public Works Act (Act of Aug. 24, 1949, 63 Stat. 627 et seq., 48 USCA § 486), which followed President Truman's special message to Congress on May 21, 1948.¹ The avowed purpose of this statute was—

"... to foster the settlement and increase the permanent residents of Alaska, stimulate trade and industry, encourage internal commerce and private investment, develop Alaskan resources, and provide facilities for community life through a program of useful public works." (48 USCA § 486.)²

Secondly, Alaska's greatest natural resource is its fisheries—in fact, fisheries constitute "the backbone of the Territory's economy with regard to permanent value, employment, and taxable wealth."³ Under these circumstances, then, any legislative action by the Territory which would tend to foster the development of this industry in such a manner as to promote the settlement of Alaska and increase its permanent pop-

¹See 1948 U. S. Code Congressional Service, pp. 2479-2484.

²For legislative history of this Act, see 1949 U. S. Code Congressional Service, pp. 1848-1858.

³B. W. Denison, "Alaska Today", the Caxton Printers, Ltd., Caldwell, Idaho, 1949, p. 166, referred to in the lower court's opinion at R. 168.

ulation would logically meet with congressional approval for it would have the direct result of promoting the end toward which Congress has directed its legislation with respect to Alaska.

It is, therefore, entirely reasonable to reach the conclusion that Congress over the years has indicated at the very least its tacit or implied consent to a scheme of taxation such as that contained in Chapter 66, for—

(1) the business of fishing was a main subject for consideration by Congress at the time of the adoption of the Organic Act (see *Alaska Pacific Fisheries v. Territory of Alaska*, 236 F. 52, 57-58, certiorari denied 242 U.S. 648, writ of error dismissed 249 U.S. 53), and since that time Congress has made comprehensive provisions for the regulation and conservation of the Alaska fisheries;⁴

(2) Alaska has had almost continuously since 1921 a license tax on nonresident fishermen greater in amount than that imposed on residents,⁵ and at no time during this thirty-year period has Congress shown any sign of dissatisfaction with this exercise of legislative power. Cf. *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277-278, or with the interpretation given it in 1923 by this Court in *Haavik v. Alaska Packers' Association*, 263 U.S. 510,

⁴See laws pertaining to Alaska fisheries in 48 USCA §§221-247.

⁵Chapter 31 Session Laws of Alaska 1921; Chapter 94 Session Laws of Alaska 1923; Chapter 57 Session Laws of Alaska 1925; Chapter 96 Session Laws of Alaska 1929 (declared invalid in *Freeman v. Smith*, 44 F. 2d 703 and 62 F. 2d 291); Chapter 30 Session Laws of Alaska 1933; and Chapter 66 Session Laws of Alaska, 1949.

or, in 1934, by the United States Court of Appeals for the Ninth Circuit in *Anderson v. Smith*, 71 F. 2d, 493;⁶

(3) although the Territory's authority to tax with respect to fisheries, as any other business, could probably have been based upon that part of § 9 of the Organic Act of Alaska, (37 Stat. 514, 48 USCA § 77), which extends the legislative power to "all rightful subjects of legislation", Cf. *Peacock & Co. v. Pratt*, 121 F. 772, 775-776, Congress was not content with this but made specific reference to the power of taxation with respect to the fisheries of Alaska;⁷ and

(4) such a scheme of tax incentive has a natural tendency to encourage those who earn their livelihood from the fisheries to acquire a local residence, and thus, while developing this great natural resource, to promote rather than retard the permanent growth of population and achieve ultimate congressional objectives.⁸

⁶For cases involving legislative construction by inaction or acquiescence, see *United States v. Elgin, Joliet & Eastern Railway Co.*, 298 U.S. 492, 500; *Missouri v. Ross*, 299 U.S. 72, 75.

⁷In § 8 of the White Act (43 Stat. 467, 48 USCA § 228) Congress, after making comprehensive provision for the regulation of the fisheries of Alaska, added this section: "Nothing contained in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title."

⁸For cases where tax exemptions have been sustained on the theory of promoting non-fiscal objects, see *Zero Transit Co. v. Georgia Commission*, 295 U.S. 285, 291; *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 512.

Consequently, even if a classification such as that in Chapter 66 would be invalid under the commerce, privileges and immunities, and equal protection clauses of the Constitution, if enacted by a state, congressional acquiescence as far as Territorial taxes relating to fisheries are concerned, has constituted a removal or waiver of these limitations. The only restrictions in classifying resident and nonresident fishermen would be those contained in the requirements of due process under the Fifth Amendment, or under the standard that Congress itself has established that no citizen of the United States shall be denied the right to fish in the waters of Alaska (White Act § 1, 43 Stat. 464, 48 USCA § 222)—either of which would appear to contain the same restriction, i.e., that the amount of tax charged any fisherman be not so great as to unreasonably interfere with the right of a citizen of the United States to engage in fishing in Alaska. As far as the latter limitation is concerned, this was the view previously adopted by the United States Court of Appeals for the Ninth Circuit in *Freeman v. Smith*, 44 F. 2d 703 (certiorari denied 282 U.S. 904), and 62 F. 2d 291, and in *Anderson v. Smith*, 71 F. 2d 493. As Circuit Judge Wilbur stated in the latter case which involved a Territorial statute taxing nonresident fishermen \$25 and residents \$1 (p. 495):

"The question involved here, then, is not the power of the Legislature to discriminate between residents and nonresidents, but the question is whether or not the license fee imposed by the territorial Legislature is an unreasonable interference with a right granted by Congress, and,

therefore, impliedly prohibited by Congress. It is clear then that so long as the license tax imposed by the territorial Legislature upon the citizens of the United States who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with, the exercise of the right granted by Congress, it is within the power of the territorial Legislature. We cannot say that the license fee imposed by (the) territorial Legislature in 1933 and now under attack is so unreasonable as to conflict with the act of Congress granting the right to fish (48 USCA § 222)."

Nor can it be said here that the tax imposed under Chapter 66 on nonresident fishermen is so unreasonable as to conflict with the act of Congress granting the right to fish. First of all, enormous increases in the cost of living during the last twenty years will justify an increase in tax from \$25 in 1933 to \$50 in 1949 (see dissenting opinion of Chief Judge Denman in Court below, (R. 193); and, secondly, a gill-net fisherman who averages net earnings of approximately \$2500 for a fishing season of twenty days (R. 11-13, 17, 80-81), or a troller who averages approximately \$3500 in a season of from four to five months (R. 10-11, 17) could hardly contend that a tax of \$50 is so exorbitant and unreasonable as to practically prohibit or interfere with the right to fish which has been granted by Congress. As a matter of fact, no such assertion has been made by respondents in this case.

There is good reason, then, for holding, as the court has done, that the power vested by Congress in the Territorial legislature to tax with respect to the fisheries of Alaska is "express and unlimited", *Alaska Fish Co. v. Smith*, 255 U.S. 44, 49, and an "unlimited power expressly given," *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277.

Chapter 66 is, therefore, valid against the assertions that the limitations contained in those clauses of the Constitution pertaining to commerce, privileges and immunities, and equal protection of the laws have been transcended. To hold otherwise will be to seriously impair the Territory's acknowledged power of taxation, with the necessary result of retarding and hampering well recognized congressional objectives relating to Alaska. This, in effect, would constitute an attempt by the judiciary to impose limitations upon the exercise by Congress of its legislative power over the Territory—limitations that are very clearly not authorized by the Constitution.

III.

CHAPTER 66 WOULD BE CONSTITUTIONAL EVEN IF ALASKA WERE A STATE.

Assuming, for the sake of argument, that those clauses of the Constitution relating to commerce, privileges and immunities of state citizenship and equal protection of the laws limit the legislative power of the Territory to the same extent as they

do state legislation, there are still perfectly valid and independent reasons for sustaining the validity of Chapter 66 against the assertion that the classification between resident and nonresident fishermen offends these constitutional prohibitions.

1. The record shows that thousands of nonresident fishermen come to Alaska each year (R. 52-53, 69) and engage in fishing for salmon in Alaska during fishing seasons which vary from twenty days in Bristol Bay (R. 11, 80-81) to four or five months elsewhere (R. 10-11), during which time they enjoy the protection of local government. But in exacting from such nonresidents their fair share of the cost of governmental protection by the fishermen's license tax, extraordinary and almost insuperable difficulties are encountered by petitioner and his agents. Nonresident trollers come to Alaska each year in their own power boats and fish along the many miles of Alaska coastline. They own no property and have no homes in the Territory (R. 85-86), they are not required by shipping laws to enter or clear upon arrival in or departure from the Territory and their boats are not only large and in first-class shape (R. 101), but are supplied before leaving the States for the fishing grounds in Alaska with necessary staples and fishing gear (R. 99). These nonresident trollers not only neglect to purchase the nonresident fishing licenses, but even deliberately evade such payment by dodging the tax collector (R. 99-107), by warning each other by radiophone of his proximity (R. 99-100, 105) and by purchasing resident fishing licenses (R. 107).

The circumstances, however, with respect to resident trollers are entirely different and no such tremendous enforcement problems must be met. Since the residents have homes in the Territory and live in villages and towns where agents of petitioner are situated, it is a simple matter for petitioner's deputies to collect the tax before the fishing season opens (R. 97-98). Violators among the residents can easily be apprehended at their places of residence after the season is closed (R. 108).

Much of the same burden and inconvenience is encountered with respect to collection of the license tax from nonresident gillnet fishermen, trap watchmen and tendermen. Again, these nonresident fishermen will not voluntarily pay the tax, and again, the tax collector must seek them out by the process of covering by boat or airplane many miles of area (R. 109). The efforts to enforce the statute here, however, are even more unlikely to be met with success than in the case of trollers because of the short fishing season of approximately twenty days (R. 80-81). Also, as in the case of the nonresident troller, the nonresident gillnet fishermen will purchase resident licenses in an attempt to avoid the fee that they are required to pay (R. 109). And there is still difficulty in enforcement with respect to nonresidents employed by canneries in Bristol Bay, where license fees are ordinarily collected for the Territory by the canneries (R. 110). If all the fees from all nonresident fishermen there were collected pursuant to this plan, all would be well, but as the evidence

shows, even here there is evasion (R. 110-113). The same situation exists with respect to nonresident trap watchmen employed by canneries (R. 114).

As in the case of the resident trollers, there is no real enforcement problem with respect to resident gillnet fishermen. Those who are not employed by canneries ordinarily purchase licenses before the fishing season opens (R. 108); and in the cases where canneries deduct the license fees from wages, those persons who have fished only for a short time, from whom no deductions are made by the canneries, and who thus evade payment of the tax, (R. 110-111), are not ordinarily resident fishermen but non-residents. As the evidence shows, the resident gillnetters who work for canneries during the season at Bristol Bay need licenses to fish in a later season of the year (R. 112).

In view, therefore, of the showing that nonresident fishermen own no property and have no homes or other ties in Alaska, that they come to the Territory only for a relatively short period of time and depart therefrom immediately after the fishing season closes, that they deliberately evade the law by refusing to pay the license tax and by throwing obstacles in the path of the tax collector who must seek them out along the thousands of miles of Alaska coastline, it is little wonder that ninety percent of the cost of collecting the taxes under Chapter 65 is incurred in collecting or attempting to collect them from the nonresident fishermen (R. 21, 120). Because, then, of these facts, it can hardly be con-

tended that this classification does not rest on substantial differences bearing a rational relation to the principal object of the legislation, which is the raising of revenue, *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, or that a state of facts cannot be conceived to sustain the difference in treatment given. *Tax Commissioners v. Jackson*, 283 U. S. 527, 537. Administrative convenience and expense in the collection of the tax will alone afford a sufficient justification for the imposition of a higher tax on nonresidents. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511; *Madden v. Kentucky*, 309 U. S. 83, 89-90.

It may well be that without any evidence of the kind petitioner has presented, the Court would, under the equal protection clause, be constrained to hold Chapter 66 invalid on the ground that no state of facts could be conceived that would rationally support the discrimination. See dissenting opinion of Mr. Justice Stone in *Colgate v. Harvey*, 296 U. S. 404, 441. But this could not be the case when, as here, more than enough facts have been proved to attach to this statute a presumption of constitutionality, one that can be overcome only by the most explicit demonstration that either the purpose or effect of this statute was a hostile or oppressive discrimination against the nonresident fishermen. See *Madden v. Kentucky*, 309 U. S. 83, 85; *Lawrence v. State Tax Commission*, 286 U. S. 276, 284. Thus the burden of overcoming this presumption and establishing the invalidity of Chapter 66 was cast

upon the respondents. *Metropolitan Insurance Co. v. Brownell*, 294 U. S. 580, 584; *Lawrence v. State Tax Commission*, *supra*, p. 283.

Respondents have failed to maintain their burden in this respect. All they have done is to demand from the Tax Commissioner, by interrogatories (R. 33-34), a statistical breakdown or analysis of the costs of collection, respectively, of resident and nonresident fishermen's license taxes. And when this was not forthcoming (for good and sufficient reasons, as shown in the Tax Commissioner's answer to such interrogatories (R. 31-32), respondents simply sat back and did nothing to prove the allegations of their complaint, apparently on the theory that a judgment invalidating the statutory classification would necessarily follow if the Tax Commissioner did not keep a complete and detailed record showing a comparative analysis between resident and nonresident fishermen of the myriad items and operations involved in the process of collecting taxes from them. Thus, respondents adopted the rather unique theory that in order to sustain Chapter 66, the burden was upon petitioner to prove that the differential between the \$50 fee imposed upon nonresidents and the \$5 fee upon residents is exactly equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting the taxes from residents.

Such a position is, of course, untenable. Nearly every revenue measure contains classifications, and if in order to write a valid tax law under requirements

of equal protection, the legislature were forced to consider with mathematical exactitude the differences between the classes selected, then it could hardly function as a legislature. To interpret equality of taxation as constituting such a narrow restrictive limitation upon legislative authority would, in effect, be striking at the government's most vital function—its power to raise revenue for its continued existence. This would be an intolerable supervision completely beyond the protection which the equal protection clause of the Fourteenth Amendment was intended to assure. See *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. All that is necessary to sustain this classification is the uncontradicted proof that the inconvenience, burden and expense in enforcing the provisions of the act are substantially greater with respect to nonresidents than to residents, and that the relation, therefore, between means and end in this legislative action is not "wholly vain and fanciful, an illusory pretense." *Williams v. Mayor*, 289 U.S. 36, 42. Equal protection has never demanded that the legislature "maintain rigid rules of equal taxation, . . . resort to close distinctions, or . . . maintain a precise scientific uniformity . . ." *Welch v. Henry*, 305 U.S. 134, 145. It has been repeatedly held that an iron rule of equal taxation is not required by the Constitution. *Tax Commissioners v. Jackson*, 283 U.S. 527, 537. See also *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 284; *General American Tank Car Corp. v. Day*, 270 U.S. 367, 373-374; *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364; *State Railroad Tax Cases*, 92 U.S. 575, 612. There

is, therefore, no valid basis for holding that the classification in Chapter 66 violates the equal protection clause of the Fourteenth Amendment.

2. The presumption of validity likewise attaches, and the burden of proving unconstitutionality also rests upon respondents, when it is asserted that the higher tax on nonresidents discriminates against interstate commerce. See *Davis v. Department of Labor*, 317 U.S. 249, 257. Particularly is this true when the tax assailed, like the one here, operates *directly* only upon a local privilege, i.e., fishing in Alaska waters, and if upon interstate commerce at all, only incidentally by reason of the fact that many fishermen, not content to endure the rigors of Alaska the year around, prefer a permanent residence in the warmer climates of the States, or perhaps because the corporate salmon industry, for reasons of its own, prefers nonresidents to residents in its business. See *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187-188. Thus, it having been demonstrated by petitioner that there is a rational purpose for the imposition of a higher tax on nonresident fishermen, the burden is upon respondents to show that the additional amount charged was excessive for that purpose. Cf. *Ingels v. Morf*, 300 U.S. 290, 296. No such showing has been made, for respondents made no attempt to prove, for example, that no additional burden was cast upon the Tax Commissioner in collecting the tax from nonresidents; that this class of fishermen do not

escape the various taxes imposed by municipalities and school districts in the Territory, to which residents are subject; or that nonresidents, to the same extent as residents, are subject to the substantial increased living costs which are so prevalent in the Territory. Thus, respondents have failed to show, whatever discrimination might exist on the face of the statute, that there was any substantial discrimination in fact. Cf. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481-482. Such a showing not having been made, Chapter 66 cannot be declared invalid on the ground that it constitutes an unconstitutional burden against interstate commerce. See *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251.

Furthermore, the cases relied upon by the court below dealing with state burdens on commerce in connection with inspection fees (R. 183) and in connection with movement of persons across state boundaries (R. 169) as authority for the proposition implicit throughout the court's opinion (R. 182-183), that the burden is upon the Territory to demonstrate that the additional tax charged nonresidents does not exceed permissible limits, are inapplicable here. Those cases should be limited to like factual situations, i.e., where commerce is directly affected and not to an instance as here where the tax is directly laid upon a local business subject to local taxation and only incidentally upon interstate commerce. In the latter circumstance the burden rests upon one who challenges the legislation to actually show that there is an unconsti-

tutional burden upon or discrimination against interstate commerce. Cf. *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187-188. It may well be that the freedom of persons to travel across state-territorial boundaries is referable to the commerce clause in proper cases. See *Edwards v. California*, 314 U.S. 160, 172. But to use this protection of the commerce clause to give to a citizen of the state refuge from taxation which in fact has not been shown to impose any restraint or undue burden upon him, is to take this immunity from taxation and extend it far beyond the interests that justify it and to a point not necessary for the protection and uniformity of national commerce.

3. The court below stated (R. 185-186) that if it were not for *Haavik v. Alaska Packers' Association*, 263 U.S. 510, and the privileges and immunities clause of Article IV, §2, of the Constitution did operate to control Alaska legislation, that the evidence produced by petitioner as justification for the imposition of a higher tax on nonresidents would not be sufficient to measure up to certain "tests" laid down in the case of *Tocmer v. Witsell*, 334 U.S. 385, chief among these being that contained in this statement of Mr. Chief Justice Vinson at pp. 398-399:

"The State is not without power, for example, to . . . charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose . . ." (Emphasis added.)

And since respondents made no attempt to prove that the \$50 fee on nonresidents is arbitrary or excessive, what the Court of Appeals must be holding is that the burden was upon the Territory to demonstrate that the tax differential did not exceed permissible limits; or, in other words, that it was equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting taxes from residents. Thus, the Alaska legislature, "... in analyzing local evils and in prescribing appropriate cures", *Toomer v. Witsell*, supra, p. 396, is faced with the almost impossible burden of exact equality of taxation under this clause of the Constitution.

To interpret the privileges and immunities clauses as precluding all differences in taxation, rather than merely forbidding those that are arbitrary and unreasonable; and thus to extend its operation so that it does more than duplicate the protection afforded against discrimination by the equal protection clause of the Fourteenth Amendment, is, we submit, unreasonable. Under such an interpretation, not only are tax immunities multiplied to an alarming extent, but judicial control of legislative action with consequent restrictions upon it is so enlarged that the taxing power of the Territory, so essential for the continued existence of the government, is severely crippled. It is difficult to believe that the iron rule of equal taxation which the equal protection clause has failed to impose (see *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, 237), has now become the standard

against which tax classifications are to be tested where citizenship in a state is involved. This would constitute, as in the case of equal protection (*Cf. Ohio Oil Co. v. Conway*, 281 U.S. 146, 159), a restriction on taxing power which is wholly beyond the protection which the privileges and immunities clause of Article IV was intended to assure.

It is submitted, therefore, that if the classification in Chapter 66 does not merit condemnation as a denial of equal protection, it cannot be condemned by invoking the protection of the privileges and immunities clause. The burden should still be upon respondents to prove that this legislative scheme of taxation is arbitrary, unreasonable or capricious.

IV.

CHAPTER 66 DOES NOT VIOLATE THE CIVIL RIGHTS ACT OR §9 OF THE ORGANIC ACT OF ALASKA.

1. In *Martinsen et al. v. Mullaney*, 12 Alaska 455, 85 F. Supp. 76, 79, a case which preceded the principal one and which involved the validity of Chapter 66 as it related to nonresident halibut fisherman, the same district court as the one below was of the opinion that one portion of the Civil Rights Act (R.S. §1977, 8 USCA §41), by virtue of its express application to territories, extended the same standard of equality to territorial taxation as that furnished the states by the equal protection clause of the Fourteenth Amendment. The assertion in this case that

Chapter 66 violated the Civil Rights Act was not a subject of respondents' complaint in the district court (R. 2-6), but it was raised in the Court of Appeals (R. 165), and the failure of the court below to dispose of this question, together with other matters, was a subject of the dissenting opinion of Chief Judge Denman (R. 194-195).

Although this part of the Civil Rights Act is expressly made applicable to territories as well as states, it is applicable only to the extent of accomplishing the purpose for which it was enacted, which is to prevent the denial to one of equality of rights under law because of alienage or color, *Takahashi v. Fish and Game Commission*, 334 U. S. 410, 419-420. See also *Collins v. Hardyman*, 341 U. S. 651, 661. Obviously, the act was not designed or intended to limit territories, as distinguished from states, in the adjustments of their tax burdens, so as to add to that required minimum of equality of law secured by the due process clause of the Fifth Amendment, *Truett v. Corrigan*, 257 U. S. 312, 332, which, because of the inapplicability of the equal protection clause of the Fourteenth Amendment to territories, is the standard that limits territorial legislatures where tax classifications are involved. Hence, as far as Chapter 66 is concerned, if the Territorial legislature is not restricted by the equal protection clause of the Fourteenth Amendment, neither should it be restricted by the Civil Rights Act.

On the other hand, even if the Civil Rights Act does demand equality of taxation between resident

and nonresident fishermen, the equality demanded should be no greater than that imposed by the Fourteenth Amendment, for, as Mr. Chief Justice Vinson has pointed out in *Hurd v. Hodge*, 334 U. S. 24, 32:

"... that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve."

Therefore, since the act cannot be given a broader scope than the amendment on which it is based, what has been said of the classification in Chapter 66 as it is affected by the Fourteenth Amendment sufficiently disposes of the assertion that it violates the Civil Rights Act.

2. Respondents have also complained (R. 4) that Chapter 66 violates that part of §9 of the Alaska Organic Act which requires that "all taxes shall be uniform upon the same class of subjects . . ." (37 Stat. 514, as amended, 48 USCA §78). But if this provision has application to other than ad valorem property taxes, it would still require no greater measure of uniformity or equality of taxation than that demanded by equal protection of the laws. *Alaska Steamship Co. v. Mullaney*, 180 F. 2d 805, 817-818; *Fox v. Standard Oil Co.*, 294 U. S. 87, 102; *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577, 581. Therefore, if the classification in Chapter 66 does not violate the Fourteenth Amendment, it does not contravene §9 of the Alaska Organic Act.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Dated, Juneau, Alaska,

December 10, 1951.

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(Appendix Follows.)

Appendix.

Appendix

Chapter 66, Session Laws of Alaska, 1949.

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, \$5.00; non-resident fisherman, \$50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately pre-

ceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

Section 8. Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

Alaska Organic Act, §3.

(37 Stat. 512, 48 USCA §23)

The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

Alaska Organic Act, §9.

(37 Stat. 514, 48 USCA §77)

The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, * * *

Alaska Organic Act, §9.

(37 Stat. 514, as amended, 48 USCA §78)

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, * * *

Alaska Organic Act, §20.

(37 Stat. 518, 48 USCA §90)

All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

White Act, §1.

(43 Stat. 464, as amended, 48 USCA §222)

* * * nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.

White Act, §8.

(43 Stat. 467, 48 USCA §228)

Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title.

Alaska Public Works Act, §2.

(63 Stat. 627, 48 USCA §486)

The Congress declares that the purpose of sections 486-486j of this title is to foster the settlement and increase the permanent residents of Alaska, stimulate trade and industry, encourage internal commerce and private investment, develop Alaskan resources, and provide facilities for community life, through a program of useful public works.

Civil Rights Act

(R.S. §1977, 8 USCA §41)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, licenses, and exactions of every kind, and to no other.

Chapter 31, Session Laws of Alaska, 1921

Section 1. Any person, firm or corporation prosecuting or attempting to prosecute, any of the following lines of business, or who shall employ any of the following appliances, in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business and appliances, as follows:

12th: **FISHERIES:** * * * (h) Fishermen who are not residents of the Territory, five dollars (\$5) per annum. The term "fisherman" shall mean to include all persons employed on a boat engaged in fishing.

Chapter 94, Session Laws of Alaska, 1923.

Section 1. It shall be unlawful for any person to engage in fishing in the Territory of Alaska without first having obtained a license so to do under the provisions of this Act.

* * * * *

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
 - (b) For non-resident fishermen who during the entire year use only hook and line including trollers, but not including those who use set line \$3.00;
 - (c) For non-resident fishermen who use gill nets or set line \$10.00;
 - (d) For non-resident fishermen who use seines or set nets \$25.00;
- * * * * *

Chapter 57, Session Laws of Alaska, 1925.

Section 1. Section 2 of Chapter 94 of the Laws of 1923 is hereby amended so as to read as follows:

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
 - (b) For nonresident fishermen who use any fishing appharce except seines, \$10.00;
 - (c) For nonresident fishermen who use seines, \$25.00.
- * * * * *

Chapter 96, Session Laws of Alaska, 1929.

Section 1. That Section 2 of Chapter 94 of the 1923 Session Laws of the Territory of Alaska is hereby amended so as to read as follows:

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
- (b) For non-resident fishermen who use hook and line in trolling, \$250.00;
- (c) For non-resident fishermen who use gill nets, \$10.00;
- (d) For non-resident fishermen who use seines, \$25.00.

* * * * *

Chapter 30, Sessions Laws of Alaska, 1933.

Section 1. It shall be unlawful for any person to engage in fishing in the Territory of Alaska who is not a citizen of the United States, or who has not declared his intention to become such, and all persons qualified to engage in fishing, shall first obtain a license so to do under the provisions of this Act.

* * * * *

Section 2. * * * The license fee shall be as follows:

- (a) For each resident fisherman of all classes \$1.00;
- (b) For each non-resident fisherman who uses hook and line in trolling \$25.00;

(c) For each non-resident fisherman who uses gill nets \$25.00;

(d) For each non-resident fisherman who uses seines \$25.00;

(e) For each non-resident fisherman employed in operation of fish traps \$25.00.

* * * * *

Section 11. This Act repeals Chapter 94 of the Session Laws of 1923; Chapter 57 of the Session Laws of 1925, and Chapter 96 of the Session Laws of 1929.

